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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 629

KIMBERLY STEIN, a minor, by AUDREY H. STEIN, his parent and next friend, *et al.*,

Petitioners,

against

ELIHU OSHINSKY, Principal, Public School 184, Whitestone, New York,

and

MAX J. RUBIN, *et al.*, constituting the Board of Education of the City of New York,

and

BOARD OF REGENTS OF THE UNIVERSITY OF THE STATE OF NEW YORK,

Respondents.

BRIEF OF RESPONDENTS OSHINSKY AND BOARD OF EDUCATION OF THE CITY OF NEW YORK IN OPPOSITION TO PETITION FOR CERTIORARI

LEO A. LARKIN,
Corporation Counsel,
Attorney for Respondents,
Oshinsky and Board of Education
of the City of New York,
Municipal Building,
New York, N. Y. 10007.

SEYMOUR B. QUEL,
JOSEPH M. CALLAHAN, JR.,
SIDNEY P. NADEL,
BENJAMIN OFFNER,
of Counsel.

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Statement

The plaintiffs in this action for a declaratory judgment and injunction seek a writ of certiorari to review a judg-

ment of the United States Court of Appeals for the Second Circuit, entered July 7, 1965, which reversed the final order, judgment and decree (one paper) of the United States District Court for the Eastern District of New York, entered January 28, 1964 (BRUCHHAUSEN, J.), and directed dismissal of the complaint. The final order, judgment and decree of the District Court (1) denied the defendants' motion to dismiss the plaintiffs' amended complaint for legal insufficiency, (2) granted the plaintiffs' motion for summary judgment, (3) adjudged and declared that the infant plaintiffs have an absolute constitutional right to offer a prayer voluntarily each day in their respective classrooms in public school, and (4) enjoined the defendants from interfering with prayers voluntarily offered to Almighty God each day by the infant plaintiffs in their respective classrooms while in public school. The prayers and the right of the infant plaintiffs to offer them were made subject "to such reasonable rules and regulations as may be prescribed by school authorities".

Opinions Below

The opinion of the United States District Court for the Eastern District of New York is reported in 224 F. Supp. 757. The opinion of the United States Court of Appeals for the Second Circuit is reported in 348 F. 2d 999.

Question Presented

Are public school authorities required, by the "free exercise of religion" and "freedom of speech" provisions of the First Amendment to the United States Constitution, to allocate a portion of the daily public school program, including school personnel and the school premises, in order that those pupils who desire to express their love and affection to Almighty God, may offer a voluntary prayer each day in their respective classrooms during each school day?

Facts

(1)

The twenty-one infant petitioners herein are pupils at Public School 184, Queens, New York, where they attend classes in each of the grades in the school, namely, classes ranging from the kindergarten through the sixth grade. Their ages vary between five years and eleven years; and they and their respective parents are members either of the Protestant, Jewish, Catholic, Armenian Apostolic or Episcopalian religions. Their action was brought on behalf of themselves and all others similarly situated (Amended Complaint, par. "2", Appendix 14a-16a).*

The complaint alleges that on or about October 5, 1962, defendant Oshinsky, the Principal of Public School 184, ordered his morning session kindergarten teachers to stop the morning kindergarten children from reciting the prayer "God is great, God is good and we thank Him for our food, Amen!" before they ate their cookies and milk in the morning session (Amended Complaint, par. "7", Appendix, 18a). On the same day he allegedly also ordered his afternoon session kindergarten teachers to stop those children from reciting the following prayer:

> "Thank You for the world so sweet,
> Thank You for the food we eat,
> Thank You for the birds that sing—
> Thank you, God, for everything."
> (Amended Complaint, par. "8", Appendix, 18a)

And on the same day the Principal allegedly also ordered his teachers to stop the saying of any prayer in any classroom in Public School 184 (Amended Complaint, par. "9",

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* References are to the appendix to the brief of defendants-appellants Oshinsky and Board of Education of the City of New York in the United States Court of Appeals for the Second Circuit.

Appendix, 18a). It might be pointed out that the complaint does not allege that the kindergarten children recited the respective prayers on a voluntary basis or that the pupils in any of the other grades had ever recited prayers in their classrooms. It is reasonable to assume that five-year-old kindergarten children would recite a single, particular prayer only under instructions from and at the direction of their teachers. It might also be pointed out that the Principal's alleged order to his teachers occurred after the decision in *Engel* v. *Vitale,* 370 U. S. 421 (1962), where it was held that the voluntary conduct of a simple nondenominational prayer in the public schools was illegal.

The complaint then alleges that the defendants, the Board of Education of the City of New York and the Board of Regents of the State of New York, "have instituted a policy banning prayers in the Public Schools of the City of New York and the State of New York even where the opportunity to pray is sought by the students themselves, and as such" said defendants have "condoned and/or directed the actions of Defendant Elihu Oshinsky, Principal of P.S. 184, Whitestone, New York." (Amended Complaint, pars. "10-11", Appendix, 18a-19a). On or about February 13, 1963, the plaintiffs allegedly demanded of the defendants "that the infant plaintiffs be given an opportunity each day to acknowledge their dependence and love to Almighty God through a prayer in their respective classrooms" (Amended Complaint, par. "12", Appendix, 19a).

The remainder of the amended complaint consists of conclusory allegations to the effect that the defendants have a "non-discretionary" constitutional duty to grant public school children the opportunity to offer a prayer voluntarily, and that the defendants' failure to offer the infant plaintiffs an opportunity to offer a prayer to Almighty God violates the First Amendment to the United States Constitution, which inhibits laws prohibiting the free exercise of religion and abridging freedom of speech, made

applicable to the States by the Fourteenth Amendment to the United States Constitution (Amended Complaint, pars. "14-20", Appendix, 19a-21a).

The relief sought by the plaintiffs is that a decree be directed to the defendants "commanding them to cease interference with a prayer offered voluntarily by infant Plaintiffs each day to Almighty God in school and further commanding them to offer the Plaintiffs and infant plaintiffs an opportunity to offer a prayer to Almighty God each day in school and further for a Declaratory Judgment that such prayers voluntarily offered and such opportunity to offer a prayer by the children to Almighty God is Constitutional" (Amended Complaint, Appendix, 21a).

(2)

After the amended complaint had been served, and within the time stipulated by the parties during which the defendants could answer or otherwise move with respect thereto, the defendants moved, pursuant to Rule 12b of the Federal Rules of Civil Procedure, to dismiss the complaint for legal insufficiency (Appendix, 22a-23a). This motion, being based solely on grounds of legal insufficiency, was unaccompanied by affidavits. Thereafter, the plaintiffs moved, pursuant to Rule 56 of the Federal Rules of Civil Procedure, for summary judgment.

The District Court, deeming the defendants to be under a constitutional non-discriminatory duty to afford the infant plaintiffs an opportunity each day to express the love and affection which they have for Almighty God through a prayer in their respective classrooms, denied the defendants' motion to dismiss the complaint, and granted the plaintiffs' motion for summary judgment (Appendix, 6a-13a). The Court of Appeals, in an opinion by FRIENDLY, J., unanimously reversed and directed that the complaint be dismissed (Petitioners' Appendix B, pp. 29-36).

ARGUMENT

No substantial constitutional question is presented by the petitioners' contention that the "free exercise of religion" and "freedom of speech" provisions of the First Amendment to the United States Constitution require public school authorities to provide daily prayer periods in the public schools.

(1)

Reduced to its essence, the petitioners' position is that the constitutional guarantee of free exercise of religious worship gives them the unqualified, absolute right to carry their religious worship into the public school classroom. This right, say the petitioners, imposes a corresponding "non-discretionary" mandate upon the public school authorities to afford them the opportunity of offering a daily prayer in their respective classrooms during regular school hours. Thus, the question presented is whether the free exercise of religion is as absolute as the petitioners claim. More specifically, the question is whether the guarantee of freedom of religion, as set forth in both the "Establishment" and "Free Exercise" clauses of that constitutional guarantee, was intended to mandate the holding of daily prayer periods in the public schools. We believe that the purpose and intent of the First Amendment is that daily prayer periods shall not be held in the public schools. Certainly, there is no constitutional requirement for the holding of such daily prayer periods.

Recent decisions by this Court have made it clear that public school authorities may not provide for prayer programs or other religious exercises to be engaged in by public school children on school premises during school hours. The fact that such a program may be voluntary in that it permits the children free choice whether or not to participate has not freed it from condemnation under the First Amendment. Nor is the constitutional vice removed

by the fact that the prayer is nondenominational and nonsectarian. In short, the public school authorities are constitutionally inhibited from either requiring or sanctioning such a program (*Abington School Dist.* v. *Schempp* and *Murray* v. *Curlett,* both in 374 U. S. 203 [1963]; *Engel* v. *Vitale,* 370 U. S. 421 [1962]; *Zorach* v. *Clauson,* 343 U. S. 306 [1952]; *McCollum* v. *Board of Education,* 333 U. S. 203 [1948]).

The petitioners undoubtedly belong to that group of persons who sincerely believe that a public school education is not complete if it does not include provision for some form of religious manifestation. As a consequence, these persons were made unhappy by the decisions outlawing religious exercises in the public schools. And since the decisions rested primarily on the "Establishment" clause, the petitioners have seized upon the "Free Exercise" clause as a possible means of bringing religious exercises back to the schools. In other words, the petitioners are invoking the "Free Exercise" clause to constitutionally mandate the very same program which the courts have held the "Establishment" clause prohibits.

We submit that the "Regents' Prayer" in *Engel* v. *Vitale, supra,* and Bible Reading and The Lord's Prayer in the *Abington School District* and *Murray* cases, both cited *supra,* were not outlawed merely because they were initiated by the public school authorities. Nor do we believe that public school daily prayer periods must be conducted because some or even a majority of the public school children and their parents may desire it. We submit that religious exercises may not be held in the public schools because the intention of the First Amendment, as interpreted by the courts, is that the government, acting through the public schools, shall not become involved in matters of religion.

The freedom of religion provision of the First Amendment, when read as a whole, mandates government to

assume a role of complete neutrality with respect to religion. The prohibition against governmental involvement in religion, particularly in the instance of the use of the public schools, derives not from any hostility toward religion but rather from the judicial determination that the First Amendment intended and decreed that there be separation between the secular and religious in order to assure the supremacy of each in their respective spheres. The public schools necessarily must be limited to the secular education of their students. The religious training, education and practices of students are best left to the home, the parent, and the religious leaders.

(2)

The petitioners' contention that the "Free Exercise" clause mandates the holding of religious exercises in the public schools in order that those who wish to participate therein may do so, has been rejected by the Supreme Court.

Mr. Justice CLARK, writing for the Court in *Abington School Dist.* v. *Schempp,* 374 U. S. 203, *supra,* stated (p. 225):

> "Finally, we cannot accept that the concept of neutrality, which does not permit a State to require a religious exercise even with the consent of the majority of those affected, collides with the majority's free exercise of religion. While the Free Exercise Clause clearly prohibits the use of state action to deny the rights of free exercise to *anyone,* it has never meant that a majority could use the machinery of the State to practice its beliefs." (Italics in original)

By way of further answering the contention that religious exercises in the public schools could be constitutionally upheld under the Free Exercise Clause, Mr. Justice CLARK pointed out the lack of necessity for permitting religious exercises in the public schools, by stating (p. 226, footnote):

> "We are not of course presented with and therefore do not pass upon a situation such as military service,

> where the Government regulates the temporal and geographic environment of individuals to a point that, unless it permits voluntary religious services to be conducted with the use of governmental facilities, military personnel would be unable to engage in the practice of their faiths."

Mr. Justice BRENNAN, addressing himself to the same subject in his concurring opinion in the *Abington* case, stated (p. 299):

> "The student's compelled presence in school for five days a week in no way renders the regular religious facilities of the community less accessible to him than they are to others. The situation of the school child is therefore plainly unlike that of the isolated soldier or the prisoner."

In *Matter of Engel* v. *Vitale,* 18 Misc 2d 659, 191 N.Y.S. 2d 453 (Sup. Ct., Nassau Co., 1959), reversed on other grounds, 370 U. S. 421, *supra,* the Court at Special Term said (18 Misc 2d at p. 699, 191 N.Y.S. 2d at p. 495):

> "This is not to say, however, that the board may be compelled to permit the saying of a prayer in the schools. The cases discussed above make clear that though the 'free exercise' clause allows wide latitude to the individual in public expression of his belief and public demonstration of his worship, the freedom is not absolute. No sacred cow may impede the flow of traffic so necessary to the general welfare; no belief in polygamy, save the believer from prosecution. The state may determine the time and place, and within the limits suggested above, the manner of the exercise of such freedom, when it acts to protect its own legitimate interests or that of other citizens. The state may, therefore, in determining the curriculum of its schools, exclude any form of devotional exercise."

Obviously if the Free Exercise Clause were as broad and literal as contended by the petitioners, the *McCollum, Engel* and *Abington* cases, cited *supra,* would not have been decided as they were. If public school children have the constitutional right to be afforded the opportunity to offer a prayer voluntarily, the Board of Regents' Prayer in the *Engel* case, which the children had a right to utter or to refrain from uttering, would have been upheld under the Free Exercise right of those who wished to utter it rather than have been condemned under the Establishment Clause. Similarly, the voluntary Bible Reading and Lord's Prayer programs in the *Abington* case and the voluntary religious instructions in the *McCollum* case would have been upheld.

(3)

The respondents herein are charged with the power and duty of administering the public school system of the City of New York (New York Education Law § 2554). And in connection therewith, the respondents necessarily must establish curricula, provide for the discipline of pupils, and otherwise provide for the daily administration of the public schools.

Certainly, no child may disregard his classroom assignment and take it upon himself to engage in any kind of discussion that might then happen to strike his fancy. Obviously, he could not invoke his constitutional guarantee of free speech to sustain such conduct. The orderly administration and discipline of the public schools necessarily requires that his right of free speech yield and that he refrain from such conduct. Similarly, the plaintiffs herein may not invoke the Free Exercise Clause as a basis for requiring that the public schools be made available to them to practice their beliefs. Neither freedom of speech nor freedom of religion is absolute. While freedom to believe is absolute, freedom to act is not (*Cantwell* v. *Connecticut,* 310 U. S. 296, 303-304 [1940]; *United Public Workers* v.

Mitchell, 330 U. S. 75, 95 [1947]; *Reynolds* v. *United States,* 98 U. S. 145 [1878]; *Poulos* v. *State of New Hampshire,* 345 U. S. 395 [1953]).

The petitioners have not even alleged that they are under any compulsion to engage in the daily recitation of a prayer only during schools hours or that the prayer they wish to say is required by their respective religions. Cf. *Sherbert* v. *Verner,* 374 U. S. 398 (1963). By their own admission their daily recitation of a prayer on public school premises during school hours would be purely voluntary on their part. What the petitioners in effect are seeking to do is to impose religious practices upon the public schools, and to obtain the aid of the State therefor through use of the public schools and school personnel. This the respondents are constitutionally prohibited from permitting. And even if the respondents could permit it, they would not be required to do so.

We are not here concerned with a situation where a particular child may be under a religious compulsion to engage in a particular religious action only during usual school hours. In such a specific situation an accommodation could be made. The New York Education Law (§ 3210, subdivision 1b) authorizes the excuse of pupils for religious observance. In the case at bar, however, we are concerned with an entirely different situation. We are not concerned with the case of confined soldiers or prisoners who, if not granted State assistance in the form of chapels and chaplains, would be entirely deprived of their right to engage in prayers required by their religious beliefs. In the instant case "the student's compelled presence in school for five days a week in no way renders the religious facilities of the community less accessible to him than they are to others" (*Abington School Dist.* v. *Schempp* and *Murray* v. *Curlett, supra,* both in 374 U. S. 203, at p. 299).

The Board of Education of the City of New York may not provide the religious program which the petitioners

herein are seeking. To do so would in effect amount to a "released time" program for religion in the schools which would be in direct contravention of the holding in *McCollum* v. *Board of Education, supra,* 333 U. S. 203. On the other hand, the Board of Education of the City of New York has a "released time" program which permits the release of students for religious instruction and practices outside the schools. This program has been considered and approved in *Zorach* v. *Clauson, supra,* 343 U. S. 306. The Board of Education may not be required to provide more than what it is doing under its "released time" program. The program which the petitioners are seeking is constitutionally impermissible. In no event is it required of the respondents.

CONCLUSION

The petition for a writ of certiorari should be denied.

October 15, 1965.

Respectfully submitted,

LEO A. LARKIN,
Corporation Counsel,
Attorney for Respondents,
Oshinsky and Board of
Education of the City of New York.

SEYMOUR B. QUEL,
JOSEPH M. CALLAHAN, JR.,
SIDNEY P. NADEL,
BENJAMIN OFFNER,
of Counsel.